SUPREME COURT, U.S.
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No. 336

In the Supreme Court of the United States

October Term, 1950

THE WESTERN (OHIO-SOUTHERN) CONFERENCE REPLEADER, ON BEHALF OF PENNSYLVANIA OPERA, ET AL., PETITIONERS,

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 335

THE WESTERN (OLD SETTLER) CHEROKEE INDIANS, ON THE RELATION OF DOROTHEA OWEN, ET AL., PETITIONERS

v.

THE UNITED STATES

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OPINIONS BELOW

The opinion of the Indian Claims Commission (R. 16-23) is not reported. The opinion of the Court of Claims (R. 28-39) is reported in 89 F. Supp. 1006.

JURISDICTION

The judgment of the Court of Claims was entered May 1, 1950 (R. 39). By order of July 13, 1950, the time for filing a petition for a writ of certiorari was extended to September 27, 1950

(R. 39). The petition was filed on September 27, 1950. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1255.[1]

QUESTION PRESENTED

Whether previous decisions of this Court and the Court of Claims pursuant to which the liability of the United States to the Cherokee Indians under a treaty of 1846 and a Senate Resolution of 1850 was determined and paid are *res judicata* of a claim filed under the Indian Claims Commission Act to recover an additional amount because of alleged use of an erroneous method of computing interest.

STATUTE INVOLVED

The relevant portion of section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70a, provides:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders

[1] The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. sec. 70s, provides in section 20(c) that determinations of questions of law by the Court of Claims shall be subject to review by this Court in the manner prescribed by section 3 of the Act of February 13, 1925, which now has been superseded by 28 U.S.C. sec. 1255. Since the Act makes no provision as to the time for filing a petition for certiorari, the general provision of 28 U.S.C. sec. 350 would appear to be applicable.

of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

* * * * *

STATEMENT

This is a companion case to *The Eastern (Emigrant) Cherokee Indians* v. *United States*, No. 334, October Term 1950. The instant case was considered by both the Indian Claims Commission and

the Court of Claims at the same time as No. 334 and a single opinion was written by the Court of Claims in both cases stating the reasons why judgments of dismissal were entered.

The facts of this case are substantially the same as those in case No. 334. The principal difference here is that prior to the final determination of the account between the Cherokee Indians and the United States in *United States* v. *Cherokee Nation*, 202 U. S. 101, the present petitioners had instituted a suit under a special jurisdictional act of February 25, 1889, 25 Stat. 694 resulting in the decision of this Court in *United States* v. *Old Settlers*, 148 U. S. 427. The various items of the account between the United States and petitioners were there considered at great length, the account was stated, and a balance of $212,376.94 with interest from 1838, plus $4,179.26 without interest, was found due to petitioners. Thereafter by Act of August 23, 1894, 28 Stat. 424, 451, Congress appropriated these principal sums plus interest of $583,830.12 and, by Act of March 3, 1899, 30 Stat. 1214, 1235, it appropriated an additional $29,850.74, representing interest from 1893 to 1896.

In *United States* v. *Cherokee Nation*, 202 U. S. 101, the Court quoted at length from its opinion in the *Old Settlers* case when discussing the interest item (202 U. S. at pp. 123-126) and in determining the manner in which the judgment awarded should be distributed it stated (202 U. S. at p. 129): "So

far as the 'Old Settlers' are concerned, they have been fully paid and cannot be allowed to participate in this distribution."

Like the Eastern Cherokees, petitioners sought to have the account re-computed on the basis of the theory now urged by them in a suit brought under the Act of April 25, 1932, 47 Stat. 137. This claim was rejected on the ground that it was the precise claim adjudicated in the *Old Settlers* case. *Western Cherokees* v. *United States*, 82 C. Cls. 566, 583-585. And the same view was taken in *Cherokee Nation* v. *United States*, 82 C. Cls. 456, a suit brought under the Act of March 19, 1924, 43 Stat. 27.

The petition in the instant case again sought to have the account re-computed in a manner which would result in an additional payment of some $40,000 without interest and $308,000 with interest since 1894 (R. 7-9). Both the Indian Claims Commission and the Court of Claims held that the previous decisions of the Court of Claims and this Court were *res judicata* of this claim.

ARGUMENT

The account between the United States and petitioners was finally determined by the courts and the balance was paid more than fifty years ago. For the reasons stated in the brief in opposition filed in *The Eastern (Emigrant) Cherokee Indians* v. *United States*, No. 334, we believe that the Indian Claims Commission and the Court of Claims were

clearly correct in concluding that the Indian Claims Commission Act does not permit re-opening of the account and re-computation of the balance payable thereon as sought by petitioner.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1950.

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